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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1060

FORTH CORPORATION AND
LEE LEMAY, ADMINISTRATOR OF THE ESTATE
OF ROBERT W. CAREY, DECEASED,
Petitioners,

vs.

ALLEGHENY AIRLINES, INC. AND
UNITED STATES OF AMERICA,
Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Factual Background	2
Proceedings in the District Court	3
Proceedings in the Court of Appeals	5
Reasons For Granting the Writ	6
1. The decision of the Court below to apply a federal common law rule in an aviation tort case in which federal jurisdiction is based upon diversity of citizenship and the Federal Tort Claims Act is in conflict with the decisions of other Courts of Appeal and of this Court	6
2. By creating and applying a federal rule of contribution and indemnity in aviation cases, the Court below has decided an important question of federal law which has not been directly decided by this Court but is in conflict with principles announced in prior decisions of this Court	9
3. The decision of the Court of Appeals is directly in conflict with the applicable law of the State of Indiana	14
Conclusion	15
Appendix A—Opinion of the Court of Appeals	A1
Appendix B—Judgment of the Court of Appeals	A11
Appendix C—Denial of Petition for Rehearing	A13
Appendix D—Statutes involved	A15

CITATIONS

Cases	Page
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	6, 7, 15
Executive Jet Aviation v. Cleveland, 409 U.S. 249 (1972)	10, 11
Gatenby v. Altoona Aviation Corporation, 407 F.2d 443 (3rd Cir. 1968)	7
In re Mid-Air Collision Near Fairland, Indiana, 309 F.Supp. 621 (JPML 1970)	3
Ingham v. Eastern Airlines, Inc., 373 F.2d 227 (2d Cir. 1967)	7
Lobel v. American Air Lines, Inc., 192 F.2d 217 (2d Cir. 1951)	7
McClish v. Niagara Machine & Tool Works, 226 F. Supp. 987 (S.D. Ind. 1967)	14
McCord v. Dixie Aviation Corporation, 450 F.2d 1129 (10th Cir. 1971)	9
Morris v. Uhl & Lopez Engineers, Inc., 442 F.2d 1247 (10th Cir. 1971)	8
O'Neill v. United States, 450 F.2d 1012 (3rd Cir. 1971)	8
Richards v. United States, 369 U.S. 1 (1962)	12
Rogers v. Ray Gardner Flying Service, Inc., 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971)	8
United States v. State of Arizona, 214 F.2d 389 (9th Cir. 1954)	8
United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964)	7
United States v. Yellow Cab Co., 340 U.S. 543 (1951)	7, 12

Federal Statutes	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1346(b)	2, 12
28 U.S.C. § 1404	4
28 U.S.C. § 1407	3, 13
49 U.S.C. § 1301	8, 11
49 U.S.C. § 1506	2, 8, 11
49 U.S.C. § 1508(a)	2, 8, 11

State Statutes

Ind. Ann. Stat. Code § 8-21-4-5 (Burns 1973)	2, 14
Ind. Ann. Stat. Code § 8-21-4-6 (Burns 1973)	2, 14

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Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 20, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit, Cause Nos. 73-1392 and 73-1393, is reported in 504 F.2d 400. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 20, 1974. A copy of that judgment is attached hereto as Appendix B. A joint peti-

tion for rehearing was denied by the Court of Appeals on November 26, 1974. A copy of the order denying the petition is attached hereto as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a federal common law rule should be applied in diversity cases to claims for contribution and indemnity arising out of aviation accidents?

2. When the United States is sued under the Federal Tort Claims Act for damages arising out of an aviation accident, should its claims for contribution and indemnity be governed by federal common law or state law?

3. If a federal common law rule is created to apply to claims for contribution and indemnity in aviation cases, should that rule permit contribution or indemnity and, if so, on what basis?

4. Whether the District Court correctly dismissed the claims for contribution and indemnity by Allegheny and the United States for failure to state a claim upon which relief could be granted under Indiana law.

STATUTES INVOLVED

The federal statutes involved are 28 U.S.C. § 1346(b), 49 U.S.C. § 1506 and § 1508(a). The legislative acts of the Indiana legislature involved are Ind. Ann. Stat. Code §§ 8-21-4-5 and 8-21-4-6 (Burns 1973). These statutes are set forth in Appendix D.

STATEMENT OF THE CASE

Factual Background

This case arises out of a mid-air collision which occurred on September 9, 1969, in the airspace over Fairland, Indi-

ana, between an Allegheny Airlines DC-9 jet aircraft and a Piper Cherokee aircraft being flown by Robert Carey. The Piper Cherokee was owned by Forth Corporation, a wholly owned subsidiary of Brookside Corporation. All occupants of both aircraft were killed in the accident.

At the time of the mid-air collision, the Allegheny DC-9 was being operated under an instrument flight rules clearance from Cincinnati, Ohio to Indianapolis, Indiana and was receiving air traffic control directions from the Federal Aviation Administration facilities located at Weir Cook Airport in Indianapolis. The Piper Cherokee aircraft was being operated under visual flight rules on a cross-country flight from Brookside Airport, McCordsville, Indiana, to Bakalar Air Force Base, Columbus, Indiana.

After the accident, personal representatives of all persons killed in the accident, except one passenger and one Allegheny crewmember, commenced wrongful death actions in the federal court system. Jurisdiction in suits against Allegheny, Brookside, Forth and the estate of Carey were based upon diversity of citizenship. Suits against the United States were brought under the Federal Tort Claims Act. In addition, property damage suits were commenced in federal court to recover damages for the destruction of the two aircraft. Some of the wrongful death actions were commenced in Indiana while some were commenced in other states. The Judicial Panel on Multidistrict Litigation assumed jurisdiction over those actions commenced outside Indiana and pursuant to 28 U.S.C. § 1407 transferred them to the United States District Court for the Southern District of Indiana to supervise pre-trial discovery proceedings. *In re Mid-Air Collision Near Fairland, Indiana,* 309 F.Supp. 621 (JPML 1970).

Proceedings In The District Court

After all cases had been transferred to Indiana under § 1407, extensive discovery proceedings were undertaken

by all parties involved. Eventually the District Court ordered all cases transferred to the Southern District of Indiana for trial pursuant to 28 U.S.C. § 1404 (A. 257-270, 277-298, 305-310). Thereafter, one group of the passenger wrongful death cases was assigned for trial on February 22, 1972.

By the time of trial Allegheny and the United States had filed either cross-claims or third-party complaints against Brookside, Forth and the estate of Carey seeking contribution and indemnity. The District Court severed the cross-claims and third-party complaints from the issues to be considered at the February trial and deferred resolution of all claims for contribution and indemnity until a future date (A. 262).

Shortly after the February trial commenced, the United States and the insurers of Allegheny reached agreement on a pro-rata formula to be utilized between them in disposing of all wrongful death claims, whether by settlement or judgment (A. 471-472). Brookside, Forth and the estate of Carey were not parties to this agreement. A compromise was reached between the plaintiffs in the February trial and Allegheny and the United States and the trial was then terminated. Thereafter, Allegheny's insurers and the United States proceeded to settle the remaining wrongful death cases.

After all of the wrongful death claims had been settled, the District Court dismissed all cross-claims and third-party complaints by Allegheny and the United States for contribution and indemnity against Forth and the estate of Carey for failure to state a claim upon which relief could be granted by application of Indiana law (A. 448-449). In addition, the District Court granted summary judgment on the defenses of Forth and the estate of Carey to those claims on the grounds that the settlements paid by Allegheny and the United States constituted an accord and

satisfaction and were voluntary payments (A. 452-456). The claims by Allegheny and the United States against Brookside for contribution and indemnity were dismissed on the basis of the District Court's ruling that Brookside could not be held liable for the torts of its subsidiary Forth.

Proceedings In The Court of Appeals

Allegheny and the United States both appealed from the dismissal of their claims for contribution and indemnity against Brookside, Forth and the estate of Carey. The Court of Appeals affirmed the dismissal of the claims as to Brookside, but reversed the decision of the District Court with respect to the dismissal of the claims against Forth and the estate of Carey. It held there should be a federal law of contribution and indemnity governing mid-air collisions such as the one in this case. The basis for its holding was what the Court perceived to be the predominant interest of the federal government in regulating the nation's airways and the desirability of eliminating inconsistent results due to the application of different state laws on contribution and indemnity.

In support of its conclusion that there should be federal preemption of aviation tort litigation, the Court relied on the Federal Aviation Act, the fact that the United States was a party to the action and that pre-trial discovery had been subject to the supervision of the Judicial Panel on Multidistrict Litigation. The Court did note that it felt the Federal Tort Claims Act, which requires application of state law to claims against the United States, would not be an obstacle to the application of federal common law to the claim for contribution and indemnity made by the United States. The Court did not comment on the fact that the United States had conceded in its brief that Indiana law was applicable to its claims (U.S. Brief p. 5, Nos. 73-1392 and 73-1393).

Having concluded that a federal common law rule of in-

demnity and contribution should be fashioned to apply in aviation cases, the Court then stated it considered the better rule to be one permitting contribution and indemnity on a comparative negligence basis.

The Court disagreed with the contentions of Forth and the estate of Carey that the settlements paid by Allegheny and the United States were voluntary payments. It said that the voluntary nature of the settlement would simply be a factor to be taken into consideration by the trier of fact as to whether the settlements were reasonable in amount.

The case was heard before a three judge panel consisting of Chief Judge Luther M. Swygert, Circuit Judge Roger J. Kiley and Senior District Judge Julius J. Hoffman. Judge Kiley heard oral argument in the case, but died before he considered the Court's opinion. A joint petition for a rehearing *in banc* was filed by Forth and the estate of Carey. The petition was denied on November 26, 1974, with three of the seven active members of the court voting to grant the petition for rehearing *in banc.*

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW TO APPLY A FEDERAL COMMON LAW RULE IN AN AVIATION TORT CASE IN WHICH FEDERAL JURISDICTION IS BASED UPON DIVERSITY OF CITIZENSHIP AND THE FEDERAL TORT CLAIMS ACT IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND OF THIS COURT.

With regard to aviation accident litigation, the opinion of the Court of Appeals for the Seventh Circuit is the most significant and far-reaching case since *Erie Railroad Co.* v.

Tompkins, 304 U.S. 64 (1938). The decision of the Court below to apply a federal common law rule for contribution and indemnity in this case is unprecedented and completely without foundation under existing statutory or decisional law.

The decision conflicts with two basic legal principals established by this Court and which have been applied consistently by other Courts of Appeal. By preempting state law and fashioning a federal law of contribution and indemnity the Court below has completely ignored the *Erie* doctrine which requires that state substantive law be applied in diversity cases. Secondly, the decision conflicts with the principle that claims by the United States for contribution and indemnity arising in suits brought under the Federal Tort Claims Act are also governed by state law. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951).

The *Erie* doctrine is so well established that few courts have discussed its applicability. Customarily other Courts of Appeal have applied state substantive law in aviation tort litigation without comment where federal jurisdiction has been based on diversity of citizenship. The Court of Appeals for the Ninth Circuit applied the state law of Nevada in an aviation case to claims for contribution and indemnity between the airline involved and the United States. *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir. 1964). Under similar circumstances, the Court of Appeals for the Second Circuit applied the state law of New York to resolve claims for contribution and indemnity between an airline and the United States. *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir. 1967). In other aviation cases not involving the specific issue of contribution and indemnity state substantive law has also been applied. *Lobel* v. *American Air Lines, Inc.*, 192 F.2d 217 (2d Cir. 1951); *Gatenby* v. *Altoona Aviation Corporation*, 407 F.2d 443 (3rd Cir. 1968).

The decision of the Court below also presents a decided conflict with the decisions of other Courts of Appeal with regard to its holding that federal law should govern the claim of the United States. When the United States has been sued under the Federal Tort Claims Act, its claims for contribution and indemnity have consistently been governed by state substantive law. *O'Neill* v. *United States*, 450 F.2d 1012 (3rd Cir. 1971); *United States* v. *State of Arizona*, 214 F.2d 389 (9th Cir. 1954); *Morris* v. *Uhl & Lopez Engineers, Inc.*, 442 F.2d 1247 (10th Cir. 1971).

The Court below was persuaded to apply a federal common law rule in this case by what it perceived to be the predominant interests of the federal government in regulating the affairs of the nation's airways. In so doing, the Court relied on what it considered to be the intent of Congress as expressed in the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301, et seq. and in particular section 1108 of the Act, 49 U.S.C. § 1508(a). However, the Court failed to note that the Act expressly provides in 49 U.S.C. § 1506 that none of the provisions of the Act "shall abridge or alter the remedies now existing at common law or by statute." Nor did the Court consider opinions by the Courts of Appeal for the Fifth Circuit and the Tenth Circuit which have expressly rejected the claim that the Federal Aviation Act preempts state law with regard to aviation tort litigation.

In *Rogers* v. *Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971), the Court of Appeals for the Fifth Circuit expressly rejected a claim that the Federal Aviation Act granted a right of action in tort under the facts of that particular case and applied state substantive law. In rejecting the federal preemption argument, the Court observed that the Act made no provision for its application to tort liability and in fact expressly provided that existing common law or statutory

remedies should not be abridged or altered by anything contained in the Act. The Court further said that if Congress had intended to alter existing tort law, which has historically been left to the states, it would have done so in a more direct fashion.

In a similar case, the Court of Appeals for the Tenth Circuit in *McCord* v. *Dixie Aviation Corporation,* 450 F.2d 1129 (10th Cir. 1971), also rejected the argument that the Federal Aviation Act was intended to preempt state tort laws. The Court could find no compelling federal interests which would justify the creation and application of a federal common law rule and that to do so would constitute abusive judicial law-making. It said that the arguments for federal preemption should be directed to the lawmaking power of Congress and not to the adjudicative power of the courts.

The unique view of the Court below that federal common law should be applied in aviation cases, at least as to claims for contribution and indemnity, clearly conflicts with the foregoing decisions of other Courts of Appeal. Furthermore, it is readily apparent from the Court's opinion that the rule of federal preemption will not be limited to claims for contribution and indemnity, but will be applied to all issues arising in aviation cases. As a result of this decision, one may reasonably expect federal common law to be applied in aviation accident cases arising in the Seventh Circuit, including claims for contribution and indemnity, while state substantive law will be applied in other Courts of Appeal.

This present conflict of whether to apply federal or state law in aviation cases must be resolved by this Court.

II.

BY CREATING AND APPLYING A FEDERAL RULE OF CONTRIBUTION AND INDEMNITY IN AVIA-

TION CASES, THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DIRECTLY SETTLED BY THIS COURT, BUT IS IN CONFLICT WITH PRINCIPLES ANNOUNCED IN PRIOR DECISIONS OF THIS COURT.

The Court of Appeals decided in this case that a federal common law rule should be applied because of what it considered to be the predominant interest of the federal government in regulating the affairs of the nation's airways and for the purpose of eliminating inconsistent results in similar aviation accidents occurring in states which may have differing substantive laws.

While uniform results in aviation litigation arising anywhere in the United States may arguably be desirable, it is an extremely broad innovation which should more properly be instituted by Congress and not by the courts. In *Executive Jet Aviation* v. *Cleveland,* 409 U.S. 249 (1972), the petitioner urged that federal admiralty law should apply in that particular case, arguing that aviation tort cases should be governed by uniform substantive and procedural laws, and that by invoking admiralty jurisdiction such actions could be heard in federal courts to avoid divergent results and duplicitous litigation in multi-party cases. This Court rejected the argument for uniformity and stated:

> "If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce." 409 U.S. at 274.

Uniformity of results may be desirable in this type of litigation, but Congress alone should determine whether

the legitimate interests of the various states concerning aviation accidents occurring within their jurisdiction should be preempted by universally applied federal law. The highly specialized and technical nature of modern aviation requires that any regulation of that activity must be carefully adapted to its specific needs. Resolution of these matters involves a careful balancing of technical and public policy considerations which is a proper function for the legislative branch of government, not the judicial.

Congress has exercised its power under the Commerce Clause to control aviation by the enactment of the Federal Aviation Act, 49 U.S.C. §§ 1301, et seq. in which it declared complete national sovereignty in the air space above the United States. 49 U.S.C. § 1508(a). However, the objective of that Act, as evidenced by the Act itself and the regulations issued thereunder by the Federal Aviation Administration, is to control the movement of air traffic and to provide for the certification of aircraft and airmen. The Act makes no provision for any tort litigation arising out of aviation accidents, and in fact, expressly states that nothing contained in the Act "shall in any way abridge or alter the remedies now existing at common law or by statute . . ." 49 U.S.C. § 1506. Even though Congress has exercised its power under the Commerce Clause to regulate aircraft in flight, clearly it intended to retain the status quo between federal and state law regarding remedies available to litigants in aviation cases. Much as this Court observed in *Executive Jet,* Congress could have enacted a federal law of contribution and indemnity to apply in aviation cases, but it chose not to do so. In the absence of any intent by Congress to federally preempt aviation tort litigation, and in view of its express requirement that existing common law or state statutory remedies should not be altered by the Federal Aviation Act, state substantive law presently controls aviation tort litigation.

The Court of Appeals also considered the presence of the United States in this case as a factor favoring imposition of a federal law. It did so even though the United States conceded that the state law of Indiana should control its claims for contribution and indemnity against the petitioners. The Court said it considered the Federal Tort Claims Act as being no obstacle to the imposition of federal common law.

Jurisdiction over the United States in this case was obtained pursuant to the Federal Tort Claims Act which expressly provides that liability of the United States is to be determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Under this provision of the Tort Claims Act state law must be applied to claims asserted against the United States. If petitioners had asserted claims for contribution and indemnity against the United States, then clearly Indiana law would have been applied to resolve those claims because the alleged acts and omissions of negligence on behalf of the United States all occurred within that state. Certainly it seems fair that the same law should be applied to claims by the United States against the petitioners. Whether federal or state substantive law is applied to the claim should not be determined by which party is asserting the claim.

This principle was recognized by this Court in *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951). Furthermore, this Court has also applied state substantive law in aviation cases brought pursuant to the Federal Tort Claims Act. In *Richards* v. *United States,* 369 U.S. 1, (1962) personal representatives of airline passengers killed in an airline crash brought wrongful death actions against the United States under the Federal Tort Claims Act. This Court was called upon to decide a conflict of laws question concerning the applicability of either Missouri or Oklahoma law. In resolving that question, this Court said that the

federal courts, in multi-state tort actions, are required to look to the law of the place where the negligence occurred. This Court did not attempt to fashion a federal common law, but instead followed the requirements of the Federal Tort Claims Act as enacted by Congress and applied state law. This Court also observed that a suit against the airline involved would be governed by state law.

Contrary to the reasoning of the Court below, the presence of the United States as a party to the litigation does not favor the application of federal common law. Because of the requirements of the Federal Tort Claims Act, the presence of the United States mandates application of state substantive law.

Also, the Court of Appeals considered the fact that this litigation was subject to supervision by the Judicial Panel created by the Multi-District Litigation Act, 28 U.S.C. § 1407 as favoring application of a federal law. But that Act has no relevance to the application of federal substantive law. The Act pertains only to the consolidation of claims for pre-trial discovery proceedings. Its impact is procedural, not substantive.

The federal interests involved in this litigation are minimal. While it is true the federal government has an interest in the management and control of aircraft moving through the national airspace, this federal interest has no relevance to the outcome of litigation brought against the Indiana petitioners for contribution and indemnity arising out of settlements paid as a result of an aircraft accident. Indiana has a far more compelling interest in the rights and liabilities of its citizens. By fashioning and applying federal common law in this case, the Court below has entirely subverted these legitimate state interests.

The Court below has completely ignored the role of Congress in these matters by imposing federal preemption in

aviation cases and by constructing a specific federal rule permitting contribution on a comparative negligence basis. As a result, this Court is now presented with an exceptional opportunity to resolve an important question of federal law which affects the entire field of aviation litigation.

III.

THE DECISION OF THE COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THE APPLICABLE LAW OF THE STATE OF INDIANA.

The Court below has ignored the applicable statutory and decisional law of the State of Indiana and has rendered an opinion which is totally in conflict with the laws of that state.

The Indiana legislature has clearly expressed its intention that aviation accidents occurring in that state shall be governed by the laws of Indiana. The legislature provided in Ind. Ann. Stat. Code § 8-21-4-5 (Burns 1973) that liability arising out of an aviation accident, such as the one in this case, shall be determined by the rules of law applicable to torts occurring on land. Furthermore, Ind. Ann. Stat. Code § 8-21-4-6 (Burns 1973) provides that any torts committed while in flight in Indiana shall be governed by the laws of Indiana. Under the mandate of these statutes, the District Court quite properly looked to the law of Indiana to determine if Allegheny or the United States could state a claim for contribution and indemnity arising out of this particular aircraft accident.

Indiana has long followed the common law rule that there is no right to contribution or indemnity among joint tortfeasors. An exhaustive analysis of the Indiana law of indemnity and contribution is stated in *McClish* v. *Niagara Machine & Tool Works,* 266 F.Supp. 987 (S.D. Ind. 1967) wherein the District Court held that Indiana follows the

general rule that there can be no contribution or indemnity as between joint tortfeasors.

The decision of the Court of Appeals is totally contrary to the general common law rule denying contribution and indemnity among joint tortfeasors as applied in Indiana. The Court instead has fashioned a federal rule of contribution based on comparative negligence. This new federal rule is unsupported by any statutory or decisional authority.

This Court should grant review in order to restore the *Erie* doctrine in the Seventh Circuit and to implement the intent of Congress expressed in the Federal Tort Claims Act and the Federal Aviation Act.

CONCLUSION

For the foregoing reasons, the Joint Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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